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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRENDA DELIA MAGALLANES,

Defendant and Appellant.

G042271

(Super. Ct. No. 08NF1679)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Daniel J. Didier, Judge. Affirmed.

Kevin J. Phillips, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

We appointed counsel to represent Brenda Delia Magallanes on appeal. Counsel filed a brief that set forth the facts of the case.¹ Counsel did not argue against his client but advised the court no issues were found to argue on her behalf. Magallanes was given 30 days to file written argument on her own behalf. That period has passed, and we have received no communication from her.

Pursuant to *Anders v. California* (1967) 386 U.S. 738 (*Anders*), to assist the court in conducting its independent review, counsel provided the court with information as to issues that might arguably support an appeal. We have reviewed the information provided by counsel and have independently examined the record. We found no arguable issues. (*People v. Wende* (1979) 25 Cal.3d 436.) We affirm the judgment.

FACTS

An information charged Magallanes with one count of robbery (Pen. Code, § 211)² and one count of assault with a deadly weapon (§ 245, subd. (a)(1)). The information alleged she personally used a knife in the commission of the robbery (§ 12022, subd. (b)(1)).

One evening, Macy's Department Store loss prevention officers received a call from a cosmetics sales clerk. At trial, Magallanes objected when one of the loss prevention officers testified as to what the clerk told her. Indicating the information was not being offered for its truth but to explain future conduct, the trial court overruled the hearsay objection. The clerk said she had seen a woman take a Tresor fragrance set, refuse to pay for it in the cosmetics department, and walk away with it. She described the woman as wearing a black tank top, jeans, and carrying a Tresor fragrance set. One of the officers initiated closed-circuit television observation and saw a female, Magallanes,

¹ Subsequent to filing the brief, counsel was relieved, and Anita P. Jog was appointed to represent Magallanes.

² All further statutory references are to the Penal Code, unless otherwise indicated.

matching the clerk's description. The first loss prevention officer, Krista Fulton, called a second loss prevention officer, Elizabeth Gonzales, who was on the floor, and asked for assistance.

Magallanes was observed carrying a purse and shopping bags, including a red Macy's bag. After observing Magallanes for approximately 10 minutes, Gonzales followed her into the fitting rooms. Magallanes had a hooded sweater and a pair of jeans when she entered the fitting rooms. Fulton entered the fitting rooms and positioned herself so that she could see Magallanes. Fulton observed her pulling on a security sensor attached to the jeans. Magallanes put the jeans down and left the fitting room without the sweater in her hands. Fulton checked the fitting room Magallanes was using, and the surrounding rooms, but did not see the sweater.

Gonzales watched Magallanes as she selected merchandise and when she reentered the fitting rooms, Gonzales followed. Gonzales saw her try on a black dress. After taking off the dress, Magallanes removed a small metal object from the back pocket of her jeans and used it to remove a sensor from the black dress. Both Gonzales and Fulton saw Magallanes had a knife in her right front jeans pocket. Magallanes placed the sensor she had removed from the black dress in the pocket of the jeans she had selected from the sales floor, and placed the black dress in her canvas Macy's bag. Fulton observed Magallanes's bags were noticeably fuller when she left the fitting rooms.

Gonzales retrieved the sensor from the jeans. Fulton told Gonzales Magallanes was leaving the store, and Gonzales ran outside to assist Fulton. When Gonzales saw Magallanes, she had the Tresor bottle in her hand, and Fulton was with her. Fulton and Gonzales identified themselves as loss prevention officers, and Fulton told Magallanes she needed to speak to her about unpaid merchandise. Gonzales grabbed Magallanes's wrist and bent it back behind her back, but she began swinging her arms and bags in all directions and broke free. Fulton grabbed her, but again she broke free.

She pulled a knife from her front pants pocket and swung it toward Fulton, cutting Fulton's right hand.

When Fulton released her, Magallanes walked through the parking lot. She was observed dropping her bags between some cars and throwing the knife in a drainage ditch. Gonzales called the police. When the police arrived, Gonzales directed the police to the area where Magallanes had thrown the knife and it was retrieved. A bag containing a black blouse, a white hooded sweatshirt, a black dress, and a Tresor perfume bottle was also recovered.

Prior to trial, the prosecutor sought permission to introduce evidence of Magallanes's prior conduct pursuant to Evidence Code section 1101, subdivision (b). Specifically, the prosecutor wanted to introduce evidence of a misdemeanor theft of meat from a market committed roughly a year prior to the instant offense, and a misdemeanor theft of copper wire committed roughly two years prior to the instant offense. The prosecutor also sought to introduce evidence of a felony theft committed roughly three months after the instant offense. The prosecutor maintained all three incidents were admissible as prior conduct demonstrating an intent to steal rather than mistake. Magallanes objected arguing the crimes were not sufficiently similar and were more prejudicial than probative. As to the recent felony theft, the prosecutor argued it was the most similar to the current charge because it involved a commercial clothing store.

The trial court ruled evidence of the felony theft could be admitted, finding there were significant similarities that tended to prove modus operandi or common plan or scheme, as well as absence of mistake. On balance, the court found the probative value of the evidence was substantially outweighed "by the other negative issues under [Evidence Code section] 352" The court noted misdemeanor offenses are generally not allowed under Evidence Code section 1101, subdivision (b), and refused to allow the prosecution to introduce evidence of the two misdemeanor offenses. The prosecution

sought to use the misdemeanors as impeachment evidence if Magallanes testified. The court tentatively denied the request to use the misdemeanor for impeachment purposes.

The prosecutor next sought permission to impeach Webb with a misdemeanor offense should she testify. The trial court indicated that if the witness testified, it was unlikely the prosecutor would be allowed to impeach with misdemeanor convictions. Next, defense counsel sought permission to impeach Fulton with a prior misdemeanor conviction for violation of Health and Safety Code section 11360, subdivision (b), if she testified. Again, the court indicated it was unlikely to allow impeachment with misdemeanor offenses.

The prosecutor introduced evidence of the subsequent felony theft. Loss prevention officer Cruzita Diaz testified regarding a theft that occurred at a JCPenney's store three months after the offense here. Magallanes and a male companion were observed in the store. Magallanes was carrying a purse and a white canvas Macy's bag. Diaz saw her twice enter fitting rooms with merchandise, and exit with only some of the merchandise she had when she entered. Diaz checked the fitting rooms Magallanes had used and did not find the other items of merchandise. As Magallanes and her male companion exited the store, loss prevention officers stopped them. Diaz recovered \$160 worth of store merchandise inside the Macy's bag. Magallanes claimed "she was trying to return the merchandise without a receipt."

Magallanes testified she went to Macy's to return several items. She had her niece's jacket, a dress, a black blouse, and perfume to exchange for her sister, Nora Webb, and a white top to exchange for her daughter. She wanted to exchange the Tresor perfume for Pleasures perfume and the clothing for different sizes. She did not return the Tresor because the Pleasures was more expensive than the Tresor. She admitted taking jeans into a fitting room but denied fidgeting with the security tag. She also admitted taking a black dress into a fitting room but denied reaching into her back pocket for a tool to remove the security tag. When she left the fitting room, she left the clothing on the

floor because the rack was full. She did not exchange the black dress she had brought with her because she realized it was the same size as the one she tried on. She did not make any other exchanges because it was getting late, and she was afraid she was going to miss her bus.

Magallanes insisted that when she left the store the only items she had with her were the items she had with her when she entered. When the loss prevention officers approached her, they did not identify themselves but just started running at her yelling, ““Give me your bags. Give me your bags. We want your bags.”” She was scared. Magallanes admitted she had a knife in her front pocket that she kept for protection but denied pulling the knife out when the loss prevention officers confronted her. She testified Gonzales started fumbling with her pockets. Magallanes feared she was going to be hurt with her own knife and insisted it was Gonzales who cut herself while the two were struggling over the knife.

Believing she was being robbed, Magallanes broke free and began running. As she did, she heard one of the women say, ““Stop. Loss prevention[,]”” but she did not know whether that was true so she kept running. She admitted throwing the knife in the drainage ditch and said she did so because she was afraid she might get in trouble. When the police arrived, she was running toward the bus stop. The police did not recover any tool from her.

Magallanes admitted she took property from JCPenney’s, and immediately pled guilty because she was guilty. She denied stealing anything from Macy’s on the day in question. Webb also testified for the defense. Webb confirmed she gave her sister the Tresor perfume, the white hooded sweatshirt, and the black dress to return to Macy’s for her. She said it was not unusual for the sisters to make returns or exchanges for each other. She had returned items to Macy’s in the past without a receipt.

The jury convicted Magallanes of both charged offenses and found true the armed allegation. The trial court sentenced her to four years in prison.

DISCUSSION

Impeachment of Fulton with Prior Misdemeanor Conduct

The trial court did not err in precluding Magallanes from impeaching Fulton with prior conduct. Evidence of past misdemeanor conduct involving moral turpitude may be introduced to impeach a witness's character because it is reasonable to infer a person who has committed a crime involving moral turpitude is more likely to be dishonest. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295.) Evidence that a witness merely possessed marijuana cannot be used to impeach the credibility of the witness. (*Ibid.* [past misconduct evidence relevant to moral turpitude and logical bearing on witness's veracity].)

CALCRIM No. 361

The trial court instructed the jury with CALCRIM No. 361 as follows: “If the defendant failed in her testimony to explain or deny evidence against her and if she could reasonably be expected to have done so based on what he knew, you may consider her failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove each element of the crime beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure.”

While Magallanes did not object to CALCRIM No. 361, a claim of instructional error in giving this instruction is subject to independent review on appeal. (*People v. Rodriguez* (2009) 170 Cal.App.4th 1062, 1066.) CALCRIM No. 361 is constitutional. It is similar in content to former CALJIC No. 2.62, and both instructions have overcome the same constitutional and due process challenges which Magallanes raises in this case. (*People v. Saddler* (1979) 24 Cal.3d 671, 680-681.) CALCRIM No. 361 is properly given when there are “facts or evidence in the prosecution's case within [the defendant's] knowledge which he did not explain or deny.” (*Saddler, supra*, 24 Cal.3d at p. 682.) The trial court properly instructed the jury with

CALCRIM No. 361 because Magallanes failed to explain the tool she was observed with in the fitting room. She also failed to explain why she had no identification with her at the time of her arrest, even though she was carrying a purse and billfold. Assuming it was error, it is not reasonably probable a result more favorable to Magallanes would have occurred if the instruction had not been given. (*Saddler, supra*, 24 Cal.3d at p. 683; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

CALCRIM No. 3404

CALCRIM No. 3404 provides in relevant part: “The defendant is not guilty of [the charged offense] if [she] acted [or failed to act] without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of [the charged crime] unless you are convinced beyond a reasonable doubt that [she] acted with the required intent.” CALCRIM No. 3404 is based on . . . section 26, which provides in pertinent part: “All persons are capable of committing crimes except those belonging to the following classes: [¶] . . . [¶] Five—Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.” Magallanes did not request CALCRIM No. 3404 be given. “A court must instruct sua sponte on general principals of law that are closely and openly connected with the facts presented at trial. [Citations.]” (*People v. Ervin* (2000) 22 Cal.4th 48, 90.) A trial court must instruct on an affirmative defense even in the absence of a request, “if it appears the defendant is relying on the defense, or if there is substantial evidence supporting the defense and the defense is not inconsistent with the defendant’s theory of the case. [Citation.]” (*People v. Rogers* (2006) 39 Cal.4th 826, 887.) The evidence does not suggest Magallanes was relying on an accident defense, nor was there substantial evidence supporting this defense. We conclude the trial court was not required to instruct the jury with CALCRIM No. 3404.

Evidence of Magallanes's Subsequent Burglary Conviction

The trial court did not err when it permitted the prosecutor to introduce evidence of Magallanes's subsequent conviction for burglary. The evidence was admissible to demonstrate the existence of a common design or plan, and its admission did not contravene the policies articulated in Evidence Code section 352. (*People v. Balcom* (1994) 7 Cal.4th 414, 425-427.)

Hearsay Statements of Unnamed Cosmetics Sales Clerk

The information received from the clerk was relevant to explain the subsequent actions of the loss prevention officer, and the clerk's statements were not offered for their truth. Out-of-court statements that are not offered for their truth are not hearsay under California law (Evid. Code, § 1200, subd. (a)), and they do not violate the confrontation clause. (See *Crawford v. Washington* (2004) 541 U.S. 36, 60, fn. 9.) The trial court properly admitted the clerk's statements.

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.